

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTHONY CHARLES McDADE,

Plaintiff,

v.

CALIFORNIA BOARD OF  
CORRECTIONS,

Defendant.

No. C 07-4768 MJJ (PR)

**ORDER OF DISMISSAL**

**(Docket Nos. 2 & 4)**

Plaintiff, a California prisoner, filed this pro se civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff claims he is entitled to release from “false custody and imprisonment.”<sup>1</sup>

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

Traditionally, challenges to prison conditions have been cognizable only via § 1983,

<sup>1</sup>On the same day he filed the complaint herein, plaintiff filed a complaint in another case, No. C 07-4767 MJJ (PR), which is identical to the present complaint in every way except that he names the California Board of Prison Terms as the defendant. Plaintiff's prior case was dismissed without prejudice on the same grounds as the dismissal of this action.

1 while challenges implicating the fact or duration of confinement must be brought through a  
 2 habeas petition. Docken v. Chase, 393 F.3d 1024, 1026 (9th Cir. 2004). Challenges to the  
 3 lawfulness of confinement or to particulars affecting its duration are the province of habeas  
 4 corpus." Hill v. McDonough, 126 S. Ct. 2096, 2101 (2006) (quoting Muhammad v. Close,  
 5 540 U.S. 749, 750 (2004)). The Supreme Court has consistently held that any claim by a  
 6 prisoner attacking the fact or duration of his confinement must be brought under the habeas  
 7 sections of Title 28 of the United States Code. See Calderon v. Ashmus, 523 U.S. 740, 747  
 8 (1998); Edwards v. Balisok, 520 U.S. 641, 648 (1997); Preiser v. Rodriguez, 411 U.S. 475,  
 9 500 (1973). A claim, such as the claim raised herein, in which plaintiff seeks to be released  
 10 from custody, the successful determination of which would result in entitlement to an earlier  
 11 release, must be brought in a habeas petition. See Butterfield v. Bail, 120 F.3d 1023, 1024  
 12 (9th Cir. 1997); see also Ramirez v. Galaza, 334 F.3d 850, 858-59 (9th Cir. 2003) (implying  
 13 that claim, which if successful would "necessarily" or "likely" accelerate the prisoner's  
 14 release on parole, must be brought in a habeas petition).

15 A civil rights complaint seeking habeas relief should be dismissed without prejudice  
 16 to the prisoner's bringing it as a petition for writ of habeas corpus. See Trimble v. City of  
 17 Santa Rosa, 49 F.3d 583, 586 (9th Cir. 1995). Accordingly, plaintiff's complaint is  
 18 DISMISSED without prejudice to refiling in a petition for a writ of habeas corpus after he  
 19 has properly exhausted such claims in the state courts.<sup>2</sup> In light of this dismissal, the  
 20 application to proceed in forma pauperis is DENIED.

21 The clerk shall close the file and terminate docket numbers 2 and 4.

22 IT IS SO ORDERED.

23 DATED: 10/12/2007

24   
 25 MARTIN J. JENKINS  
 United States District Judge

26 <sup>2</sup>Although plaintiff is clear that he seeks release from custody, the grounds upon  
 27 which he is alleging his custody is illegal are not entirely clear from the allegations in the  
 28 complaint. If plaintiff wishes to pursue a habeas petition to seek immediate or earlier release  
 from custody, he must clearly set forth in his petition the reasons he believes his confinement  
 violates federal law.

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY CHARLES MCDADE,  
Plaintiff,

Case Number: CV07-04768 MJJ

**CERTIFICATE OF SERVICE**

v.

CA BOARD OF CORRECTIONS et al,  
Defendant.

---

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 16, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Anthony Charles McDade  
San Quentin State Prison  
Prisoner Id T-62713  
San Quentin, CA 94974

Dated: October 16, 2007



Richard W. Wieking, Clerk  
By: Lashanda Scott, Deputy Clerk